UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

REPUBLIC OF ECUADOR, **10-1020 – cv(L)**

Petitioner-Appellant, **10-26-cv(con)**

DANIEL CARLOS LUSITAND YAIGUAJE, et al.

Plaintiffs-Appellants,

-against-

CHEVRON CORPORATION, TEXACO PETROLEUM COMPANY,

Defendants-Appellees

----------x

MOTION BY EMERGENCY COMMITTEE FOR AMERICAN TRADE AND NATIONAL ASSOCIATION OF MANUFACTUERS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY

The Emergency Committee for American Trade (ECAT) and the National Association of Manufacturers (NAM) respectfully move for leave to file the attached brief as *Amici Curiae* in support of Appellees, Chevron Corporation and Texaco Petroleum Company for affirmance.

Movants seek leave of Court because, while Appellees have consented to the filing of this brief, the Petitioner-Appellant and the Plaintiffs-Appellants did not consent to the filing of this *amici* brief without conditions that could not be mutually agreed upon.

Leave to file this brief should be granted because it addresses two key issues that are highly important to the proper disposition of this appeal: (1) the authority

of U.S. courts to consider a motion by a foreign government and third party litigants to stay arbitration under a U.S bilateral investment treaty ("BIT") that specifically provides the consent of both the U.S. and the Ecuadorian government to such arbitration; and (2) the negative effect that such a stay would have on the value and purposes of the U.S. BIT program for U.S. companies that invest overseas, as well as the economic and foreign policy interests of the United States.

As non-profit business associations representing a large swath of the U.S. international business sector, ECAT and NAM have a unique interest and unique expertise in both matters. Both ECAT and NAM are very involved with the development of U.S. investment policy, investment agreements and the promotion of U.S. investment overseas to promote economic growth and opportunity in the United States.

ECAT is an organization of the heads of leading U.S. international business enterprises representing all major sectors of the American economy. Their annual worldwide sales exceed $1.6 trillion and they employ more than 6.2 million persons. ECAT's purpose is to promote economic growth through the expansion of international trade and investment, and it does so by representing ECAT companies with respect to policies, legislation, international agreements and related matters before the U.S. government, as well as before international organizations and with foreign governments and other industry groups.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding about the vital role of manufacturing to America's economic future.

ECAT and NAM represent a substantial portion of U.S. businesses in the United States, particularly those that are engaged in the international economy through exports, imports and foreign investment, and, indirectly, a major portion of the U.S. workforce. The *amici* are umbrella organizations charged with representing the interests of their business members in matters of national import, including the continued viability of international investment treaties, on which this litigation could have a serious impact.

As organizations representing the interests of U.S. companies that invest overseas, therefore, both ECAT and NAM have a vital interest in the issues raised in this appeal. A reversal of the District Court decision would undermine U.S. investment protections not only in Ecuador, but also in the 40 U.S. bilateral investment treaties currently in force and the U.S. trade agreements with similar provisions, and, as a consequence, have highly negative impacts on the security of the investments of ECAT and NAM member companies throughout the world and

their ability to seek investor-state arbitration if and when disputes arise. Such a decision would not only impact existing investments of U.S. companies, but also decision-making by ECAT and NAM members and the broader business community about future investments in any BIT country. This decision could also impact negotiations of new BITs in which ECAT and NAM play a major role in promoting. Finally, a reversal of the District Court's decision would also cause serious harm to the Executive Branch's policy of international economic engagement by undermining the foreign investment that the Executive Branch has chosen to promote.

WHEREFORE, ECAT and NAM respectfully request this Court to grant this motion for leave to file the attached brief.

Dated: July 1, 2010

Respectfully submitted,

_____

Daniel A. Cohen (2004-523)
Kornstein Veisz Wexler & Pollard, LLP
757 Third Avenue
New York, NY 10017
(212) 418-8640

Attorneys for Amici Curiae Emergency Committee for American Trade and National Association of Manufacturers

10-1020 – cv(L)

10-26-cv(con)

United States Court of Appeals

for the

Second Circuit

REPUBLIC OF ECUADOR
Petitioner-Appellant,
DANIEL CARLOS LUSITAND YAIGUAJE, et al.
Plaintiffs-Appellants,
-against-
CHEVRON CORPORATION, TEXACO PETROLEUM COMPANY,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE, EMERGENCY COMMITTEE FOR AMERICAN TRADE AND NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF APPELLEES FOR AFFIRMANCE

Daniel A. Cohen (2004-523)
Kornstein Veisz Wexler & Pollard, LLP
757 Third Avenue
New York, New York 10017
(212) 418-8640

Attorneys for Amici Curiae
Emergency for American Trade and National Association of Manufacturers

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Emergency Committee for American Trade and National Association of Manufacturers state that each is a nonprofit organization as described in section 501(c)(6) of the Internal Revenue Code. NAM is also incorporated as a non-profit corporation. None has a parent corporation and, because they are all nonstock organizations, no publicly held corporation owns 10% or more of any of their stock.

Appellee Chevron Corporation is a member of both ECAT and NAM. ECAT and NAM are unaware of any publicly held corporation that is not a party to the proceeding before this Court having a direct financial interest in the outcome of the proceeding.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND SUMMARY 1

STATEMENT OF INTEREST 3

ARGUMENT 5

I. U.S. Courts Lack Authority to Stay Arbitration Initiated Under U.S. Bilateral Investment Treaty or Similar Instrument 7

A. U.S.-Ecuador BIT Is Legally Operative and Requires Arbitration to Proceed 8

B. New York Convention and FAA Promote Arbitration and Do Not Provide a Basis for Appellants' Request for a Stay 10

II. Allowing a Stay of Arbitration Would Subvert the Purpose and Viability of the U.S. BIT Program, an Important Mechanism to Promote U.S. Foreign-Policy Objectives 11

A. U.S.-Ecuador BIT Is Part of a Broader Executive Branch Policy Framework 12

1. U.S. BIT Program Is Vital Part of U.S. International Economic Policy 13

2. U.S. BIT Program Is Important to Support Broader U.S. Foreign-Policy Goals 17

3. Unqualified Access to Investor-State Dispute Settlement Is Vital to the Operation of the U.S. BIT Program 20

B. Reversing the District Court's Dismissal of Appellants' Unprecedented Request to Stay Ongoing Arbitration under the U.S.-Ecuador BIT Would Vitiate the U.S. BIT Program 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Statutes

Federal Arbitration Act, 9 U.S.C. Section 1 (61 Stat. 669) 7, 10-11

28 U.S.C. 1782 11

Treaties and International Agreements

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), Oct. 14, 1966, 17 UST 1270, TIAS 6090, 575 UNTS 159 9

Treaty of the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Promotion of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15 ..... *passim*

U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517; TIAS 6997; 330 UNTS 3..... 7, 10-11

Executive Branch Materials

Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34,071 (2009)..... 12, 20

U.S. Dep't of State, "Cross-Border Investment in a Post-Recession World," Speech by Robert D. Hormats, Under Secretary for Economic, Energy and Agricultural Affairs, U.S. Department of State, before the United States Council for International Business (Mar. 10, 2010), at http://www.state.gov/e/rls/rmk/2010/138306.htm..... 19, 21

President George W. Bush, Statement on International Trade and Investment Policy, (May 10, 2007) 15

U.S. Dep't of State and U.S. Trade Representative, *2004 Model BIT* at http://www.state.gov/documents/organization/ 117601.pdf 12, 18

U.S. Dep't of State, *Fact Sheet: The State Department, Open Investment and American Jobs* (Oct. 6, 2009), at http://www.state.gov/e/eeb/rls/fs/2009/130371.htm..... 14

U.S. Trade Representative, *2010 Trade Policy Agenda and 2009 Annual Report of the President of the United States on the Trade Agreements Program* (2010)..... 13, 14-15, 20

Other Authorities

Matthew Slaughter, *Global Investments, American Returns (GIAR)*, Published by Emergency Committee for American Trade (1998), at http://www.ecattrade.com/publications/final_giar_III.pdf 16

Matthew Slaughter, *How U.S. Multinational Companies Strengthen the U.S. Economy: Revised Update* (2010), Published by Business Roundtable and United States Council Foundation, at http://www.businessroundtable.org/sites/default/files/BRT%20USCIB%20White%20Paper%20Revised%20Synopsis%203%2023%2010_FORMATTED_FINAL%20v2.pdf..... 16-17

Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, North Carolina Law Review, Vol. 86, 2007..... 23

Transparency International, *Transparency International Corruption Perceptions Index 2009*, at http://www.transparency.org/policy_research/surveys_indices/cpi/ 2009/cpi_2009_table 22

United Nations Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, UNCTAD/WIR/2009, ISBN: 978-92-1-112775-1, at http://www.unctad.org/en/docs/wir2009_en.pdf..... 19

United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, General Assembly Resolution 31/98..... 9-10

World Bank, *Aggregate Governance Indicators 2009*, at http://info.worldbank.org/governance/wgi/sc_chart.asp..... 22

INTRODUCTION AND SUMMARY[1]

Appellants' unprecedented attempt to stay an arbitration that was duly commenced pursuant to an international treaty threatens the security of current and future investments of U.S. businesses throughout the world and would undermine the Executive Branch's policy of international economic engagement through the promotion of such foreign investment and international treaties.

U.S. international economic engagement is more important than ever to America's ability to spur economic growth, generate and maintain good-paying jobs here at home, enhance our national security and renew our country's leadership position in the world. Over the last century, the United States, now the world's largest trading and investing nation, has enjoyed enormous prosperity in large part because of the policies on trade and investment liberalization it adopted in 1934 and thereafter. Over the last decade, U.S. trade and investment in goods and services have accounted for an increasing share of U.S. economic growth and contributed significantly to the high standard of living enjoyed by American

---

[1]Pursuant to Local Rule 29.1(b), Emergency Committee for American Trade (ECAT) and National Association of Manufacturers (NAM) (collectively "*amici*") make the following statement.

(1) This brief was authored by *amici* with their counsel and was not authored in whole or in part by any party to this litigation or by any party's counsel.

(2) No party to this litigation or party's counsel contributed money that was intended to fund preparing or submitting the brief.

(3) No other person, entity or counsel, other than the amici, contributed money that was intended to fund preparing or submitting the brief.

workers and their families. With 95 percent of the world's population and nearly 80 percent of the world's purchasing power outside U.S. borders, trade and investment are vital to grow America's industries, jobs and economy. Trade and investment also support broader U.S. national interests in promoting stability and economic development around the world.

BITs represent a vital component of the United States' economic engagement in the world economy. They encourage international investment by ensuring both U.S. investors and participating foreign countries of a neutral forum to resolve disputes arising out of the conduct of international investment, as well as by promoting the rule of law.

The decision of the District Court, denying Appellants' stay application, should be affirmed for two reasons. First, U.S. courts lack jurisdiction to consider the application, which under settled principles of international law only the arbitration tribunal itself was empowered to hear. Second, granting such an application would undermine the international competitiveness of U.S. companies and the U.S. economic and broader foreign-policy interests of the United States by undermining the longstanding Bilateral Investment Treaty (BIT) program, and thus represent an unwarranted intrusion on matters delegated to the Executive Branch.

STATEMENT OF INTEREST

Emergency Committee for American Trade (ECAT) and National Association of Manufacturers (NAM) (collectively "*amici*") are non-profit business associations that represent a substantial portion of U.S. businesses in the United States, particularly those that are engaged in the international economy through exports, imports and foreign investment, and, indirectly, a major portion of the U.S. workforce.

Founded in 1967, ECAT is an organization of the heads of leading U.S. international business enterprises representing all major sectors of the American economy. Their annual worldwide sales exceed $1.6 trillion and they employ more than 6.2 million persons. ECAT's purpose is to promote economic growth through the expansion of international trade and investment, and it does so by representing ECAT companies with respect to policies, legislation, international agreements and related matters before the U.S. government, as well as before international organizations and with foreign governments and other industry groups.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in all 50 states. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to

increase understanding about the vital role of manufacturing to America's economic future.

The *amici* are umbrella organizations charged with representing the interests of their business members in matters of national import, including the continued viability of international investment treaties, on which this litigation could have a serious impact.

Both ECAT and NAM are very involved with the development of U.S. investment policy, investment agreements and the promotion of U.S. investment overseas to promote economic growth and opportunity in the United States. As described in more depth below, U.S. investment abroad, supported by strong investor protections such as those contained in bilateral investment treaties (BITs), has important benefits for the U.S. economy, U.S. companies and U.S. workers by promoting U.S. international competitiveness, exports, research and development, capital investment and good-paying jobs in the United States. BITs also promote other important U.S. economic and foreign-policy objectives.

As organizations representing the interests of U.S. companies that invest overseas, therefore, both ECAT and NAM have a vital interest in the issues raised in this appeal. A reversal of the District Court decision would undermine U.S. investment protections not only in Ecuador, but also have ramifications for the 40 U.S. bilateral investment treaties currently in force and the U.S. trade agreements

with similar provisions, and, as a consequence, have highly negative impacts on the security of the investments of ECAT and NAM member companies throughout the world and their ability to seek investor-state arbitration if and when disputes arise. Such a decision would not only impact existing investments of U.S. companies, but also decisionmaking by ECAT and NAM members and the broader business community about future investments in any BIT country. This decision could also impact negotiations of new BITs in which ECAT and NAM play a major role in promoting. Finally, a reversal of the District Court's decision would also cause serious harm to the Executive Branch's policy of international economic engagement by deterring the foreign investment that the Executive Branch and Congress have chosen to promote.

ARGUMENT

Appellants, the Republic of Ecuador ("Ecuador") and a group of individuals who are engaged in litigation with the Appellees in Ecuador ("Plaintiffs"), have asked first the U.S. District Court and now this Court to grant an unprecedented request to stay arbitration that has begun pursuant to the U.S.-Ecuador Bilateral Investment Treaty (BIT), i.e., the Treaty of the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Promotion of Investment, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15.

The District Court properly denied Appellants' application. Ecuador's action is not only directly contrary to its consent to arbitration under the terms of the U.S.-Ecuador BIT, it also represents an extraordinary effort to undermine its treaty obligations with the United States. Such action, if allowed to proceed, would have highly negative effects on the U.S. BIT program, and the scope of U.S. treaty rights as they have been understood over the past 30 years and U.S. foreign-policy interests more broadly. Furthermore, the individual Plaintiffs are seeking an unprecedented ability to stay an arbitration to which they are not a party, which is occurring under an international treaty, to which they also are not a party. Opening the door to such a claim would undermine even more egregiously the BIT program and U.S. interests.

The District Court should be affirmed on two separate and independent grounds: (1) the District Court did not have jurisdiction to decide the stay application; and (2) granting a stay would subvert the BIT program pursuant to which the arbitration was commenced, representing an unwarranted judicial intrusion on the conduct of international economic and foreign policy by the Executive Branch.

I. U.S. Courts Lack Authority to Stay Arbitration Initiated Under U.S. Bilateral Investment Treaty or Similar Instrument

Appellants propose that this Court take a novel action with regard to arbitration that is contrary to the role laid out for U.S. courts in U.S. statute and treaty: they seek to undermine, rather than promote, international arbitration by asking this Court to interfere with an international arbitration.

The threshold issue raised by this appeal is whether, in fact, the U.S. Courts may hear Appellants' extraordinary application. The District Court did not make any finding on this issue, stating that "[w]e assume without deciding that we have the power to grant a stay recognizing that there is a split between the judges of this Court as to whether it has the power to stay an arbitration." Memorandum & Order on March 16, 2010, A-2138 (Order) at 1-2.

This threshold issue of the Court's jurisdiction to grant a stay, however, is in fact dispositive of this appeal. The power to stay investor-state arbitration under a BIT or similar instrument does not exist under U.S. law and is contrary to the U.S.-Ecuador BIT, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Federal Arbitration Act (FAA).

A. U.S.-Ecuador BIT Is Legally Operative and Requires Arbitration to Proceed

The District Court lacked jurisdiction because Ecuador entered a binding treaty obligation to submit disputes such as those with the Appellee, the Republic of Ecuador, to arbitration, and because under settled principles of international law, challenges to the arbitration tribunal's jurisdiction over a pending dispute are to be decided solely by the tribunal.

Article VI.4 of the U.S.-Ecuador BIT contains clear language expressing the Government of Ecuador's (and the United States') consent to arbitration under the BIT:

> 4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3.

U.S.-Ecuador BIT at Article VI.4. That language is legally operative. The U.S.-Ecuador BIT entered into force on May 11, 1997, and neither Party has withdrawn from this treaty. Thus, Ecuador's consent to arbitrate must be enforced, and not frustrated as Appellants request.

Appellants' challenges brought against the ongoing investor-state arbitration initiated pursuant to the U.S.-Ecuador BIT are not properly within this Court's authority. Rather, it is the role of the investor-state arbitration tribunal to decide upon such matters. As provided for explicitly in both the convention of the

International Center for Settlement of Investment Disputes (ICSID) and the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) – the two primary fora for the resolution of investor-state disputes – it is the arbitration tribunal established pursuant to the BIT that has the jurisdiction to rule on the types of preliminary questions raised by Appellants in this case. Article 41 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides explicitly:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

ICSID Convention, Oct. 14, 1966, 17 UST 1270, TIAS 6090, 575 UNTS 159, Art. 41.

Similarly, Article 21 of the UNCITRAL Arbitration Rules provides:

> ***PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL***
>
> **Article 21**
>
> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

> 2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> 3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.
>
> 4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

UNCITRAL Arbitration Rules, General Assembly Resolution 31/98, Article 21.

B. New York Convention and FAA Promote Arbitration and Do Not Provide a Basis for Appellants' Request for a Stay

Neither the New York Convention nor the FAA (nor any other U.S. law) provide the authority for this Court to stay or enjoin an investor-state arbitration. To the contrary, the New York Convention and the FAA are both intended to and provide mechanisms to promote arbitration. For example, both the New York Convention and the FAA require the United States Courts not only to recognize and enforce arbitral awards, but also to honor and require an agreement to arbitrate "unless it finds that the agreement is null and void, inoperative or incapable of being performed." U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517; TIAS 6997; 330 UNTS 3,

Art. II.3; Federal Arbitration Act, 9 U.S.C. Section 1 (61 Stat. 669). In addition, U.S. law authorizes U.S. courts to help arbitration panels by compelling testimony, the production of documents or related discovery information. 28 U.S.C. 1782.

In sum, U.S. law strongly favors arbitration and requires U.S. courts to promote such arbitration in several different ways. Appellants' request that this Court interfere with and frustrate an international arbitration is both unprecedented and contrary to the purpose of these legal authorities. For these reasons, *amici* urge this Court to affirm the District Court's dismissal of Appellants' unprecedented request to stay the ongoing arbitration under the U.S.-Ecuador BIT and further include in its holding a clear statement that foreign governments, let alone persons that are not even party to the investor-state arbitration, may not seek to use the U.S. court system to evade arbitration under a BIT or similar instrument.

II. Allowing a Stay of Arbitration Would Subvert the Purpose and Viability of the U.S. BIT Program, an Important Mechanism to Promote U.S. Foreign-Policy Objectives

Even if the Court were to find that it has authority in this matter, it should abstain from granting Appellants' request and affirm the District Court's dismissal of the Appellant's request for a stay because to do otherwise would subvert the purpose and viability of a major part of U.S. foreign policy.

A. U.S.-Ecuador BIT Is Part of a Broader Executive Branch Policy Framework

The protection and promotion of U.S. investment has long been an important economic and foreign-policy goal of the United States. First, through Treaties of Friendship, Commerce and Navigation and then with BITs starting in 1982, the United States has pursued, along with many other nations, international treaties that will ensure that U.S. foreign investors would have basic international protections in their activities abroad, including access to a neutral and objective forum for the resolution of disputes, in order to promote investment, economic growth, development, stability and other important foreign-policy goals.

The United States has negotiated and signed 48 BITs since 1982, of which 40 are currently in force.[2] The United States has also entered into seven free trade agreements with thirteen countries that contain substantially similar provisions in the investment and financial services chapters of those agreements.[3] The Office of the United States Trade Representative and the U.S. Department of State are co-leading an effort to review the current provisions of the U.S. Model BIT, the

[2] *See, e.g.*, Notice of Public Meeting and Solicitation of Written Comments, 74 Fed. Reg. 34,071 (2009).

[3] North American Free Trade Agreement (between the United States, Canada and Mexico), U.S.-Central America-Dominican Republic Free Trade Agreement (between the United States, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua), U.S.-Chile Free Trade Agreement, U.S.-Morocco Free Trade Agreement, U.S.–Oman Free Trade Agreement, U.S.-Peru Trade Promotion Agreement, U.S.-Singapore Free Trade Agreement.

template for the negotiations, in order to proceed with new negotiations with key countries, such as China, India and Vietnam.[4]

The U.S.-Ecuador BIT was signed by the governments of the two countries on August 27, 1993. Then-President Clinton submitted the BIT to the Senate for its advice and consent on September 10, 1993, and the Senate approved it on November 17, 1993. In submitting the BIT to the Senate, the Executive Branch noted that: "The bilateral investment treaty (BIT) with Ecuador represents an important milestone in the BIT program. It is the first bilateral investment treaty signed with a member of the Andean Pact, and the second BIT signed with a South American country."

1. U.S. BIT Program Is Vital Part of U.S. International Economic Policy

The U.S. BIT program is an important and longstanding part of U.S. international economic and foreign policy. The United States has long promoted BITs to protect U.S. investors abroad and their property against discriminatory, unfair, arbitrary and expropriatory government action and to advance broader U.S. foreign-policy interests in the rule of law and economic growth and stability. These goals are vital since some foreign jurisdictions do not provide basic fairness protections for foreigners, let alone their own citizens.

---

[4] *See, e.g.*, U.S. Trade Representative, *2010 Trade Policy Agenda and 2009 Annual Report of the President of the United States on the Trade Agreements Program* (2010) at 11.

In its October 6, 2009 Fact Sheet on the State Department, Open Investment and American Jobs, the State Department summarized the importance of investment and the BIT program for U.S. economic objectives as follows:

> The United States has a significant stake, as both the world's largest source and recipient of foreign direct investment, in working with our economic partners both multilaterally and bilaterally to implement policies that facilitate global investment flows. The State Department encourages nondiscriminatory, open, and market-oriented environments for U.S. investment abroad through a wide range of bilateral and multilateral initiatives, including the Organization for Economic Cooperation and Development (OECD) Freedom of Investment project, the G-8 Heiligendamm process, the UN Conference on Trade and Development (UNCTAD), and the Asia-Pacific Economic Cooperation forum (APEC). *State and the Office of the United States Trade Representative share negotiation of bilateral investment treaties (BITs) that establish rules that protect the rights of American investors abroad and provide market access for future American investment.*[5]

The Office of the U.S. Trade Representative has also expressed strong Executive Branch recognition of the importance of BITs to promote U.S. economic objectives:

> Substantial investment in foreign markets has become an indispensable foundation for supporting many American exports. Bilateral Investment Treaties are important tools for protecting the interests of American enterprises in overseas markets. As a result, these treaties have taken on greater significance for promoting American jobs and prosperity. We have to keep these agreements attuned to changing

[5]U.S. Dep't of State, *Fact Sheet: The State Department, Open Investment and American Jobs* (Oct. 6, 2009) (emphasis added).

> market conditions while maintaining their consistency with broader American values.[6]

Past Administrations have issued similar statements, such as contained in the May 10, 2007, Statement of then-President George W. Bush:

> As both the world's largest investor and the world's largest recipient of investment, the United States has a key stake in promoting an open investment regime. The United States unequivocally supports international investment in this country and is equally committed to securing fair, equitable, and nondiscriminatory treatment for U.S. investors abroad. Both inbound and outbound investment benefit our country by stimulating growth, creating jobs, enhancing productivity, and fostering competitiveness that allows our companies and their workers to prosper at home and in international markets.[7]

As described below, U.S. investment overseas largely complements business activity in the United States by enabling U.S. companies to reach the 95 percent of the world's population that lives outside the United States. As recognized by the U.S. Executive Branch, U.S. investment abroad, supported by strong investor protections, has important benefits for the U.S. economy, U.S. companies and U.S. workers. Over the past 20 years, U.S. companies that invest abroad have exported more, expended more on U.S. research and development and physical capital

---

[6] U.S. Trade Representative, *2010 Trade Policy Agenda and 2009 Annual Report of the President of the United States on the Trade Agreements Program* (2010) at 11.

[7] President George W. Bush, Statement on International Trade and Investment Policy, (May 10, 2007).

investments in the United States, and paid their U.S. workers more than companies not engaged globally.[8]

Recent data from the Bureau of Economic Analysis demonstrate that:

- ***U.S. investment overseas is a magnet for U.S. exports and U.S. access to foreign markets.*** U.S. companies that invest overseas play a disproportionate role in exporting goods and services beyond our borders. These companies generated nearly half (45.2 percent) of total U.S. goods exports, while only accounting for about a quarter of total U.S. private-sector output in 2007.[9] U.S. investment overseas is largely about reaching foreign customers. Of the $4.7 trillion in sales made by foreign affiliates, about $500 billion (or 10.5 percent) of all sales were made back into the United States in 2007.[10]
- ***U.S. investment overseas strengthens U.S. companies and expands opportunities for U.S. workers, with globally engaged companies paying***

---

[8] *See, e.g.*, Matthew Slaughter, *Global Investments, American Returns (GIAR)*, Published by Emergency Committee for American Trade (1998), at http://www.ecattrade.com/publications/final_giar_III.pdf; Matthew Slaughter, *How U.S. Multinational Companies Strengthen the U.S. Economy: Revised Update* (2010), Published by Business Roundtable and United States Council Foundation, at http://www.businessroundtable.org/sites/default/files/BRT%20USCIB%20White%20Paper%20Revised%20Synopsis%203%2023%2010_FORMATTED_FINAL%20v2.pdf.

[9] Matthew Slaughter, *How U.S. Multinational Companies Strengthen the U.S. Economy: Revised Update*, supra note 8 at pp. 3, 4.

[10] Id. at 7.

higher compensation to U.S. workers **than companies that are not invested abroad.** Increased exports and sales abroad strengthen U.S. companies that are better able to support employment domestically. On average, U.S. workers at globally engaged companies earned 18.7 percent more than U.S. workers at non-globally engaged companies in 2007.[11]

- ***U.S. investment overseas spurs the productivity and competitiveness of U.S. firms and their workers,*** with globally engaged U.S. firms accounting for nearly 25 percent of total U.S. output, 31 percent of all private sector investment in the United States and about 74 percent of total U.S. research and development in 2007. [12]

The U.S. BIT program provides vital support to these important economic objectives of the United States by opening foreign markets to U.S. investment, requiring strong rules for the protection of that investment and providing a neutral, objective and efficient investor-state dispute settlement forum to ensure the enforcement of that market opening and those rules.

2. U.S. BIT Program Is Important to Support Broader U.S. Foreign-Policy Goals

U.S. investment overseas also supports other important U.S. national and foreign-policy objectives, including economic development by other nations, the

[11] Id. at 3 and 4.
[12] Id.

reduction of poverty, improved stability in developing countries, more stable U.S. access to natural-resource supplies and transparency and the rule of law.

These goals are reflected in the preamble to the 2004 U.S. Model BIT, the template for U.S. BIT negotiations. The preamble provides that the United States and partner government share the following objectives:

> *Desiring* to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;
>
> *Recognizing* that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
>
> *Agreeing* that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;
>
> *Recognizing* the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;
>
> *Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights; . . . .

2004 U.S. Model Bilateral Investment Treaty, Preamble (italics in original).

In a March 10, 2010, speech by Under Secretary of State for Economic, Energy and Agricultural Affairs, Robert Hormats, the Executive Branch also emphasized that "Broadening acceptance of open international investment policies is the foundation of economic growth, job creation, and technological advances in

the U.S. and worldwide. It will remain a major component of U.S. diplomatic engagement as we move forward."[13]

BITs also play an important role in promoting economic development around the world. It is no accident that ICSID is part of the World Bank, one of the preeminent development institutions in the world, and that its preamble recognizes the role that international investment plays in promoting economic development. Already, global foreign direct-investment flows are the largest external source of financing for developing countries, amounting to hundreds of billions of dollars and generating millions of jobs in their countries, according to the United Nations Conference for Trade and Development.[14] BITs and the certainty of investor-state dispute settlement are important to connect developing countries in need of capital with foreign investors who have such capital, but are worried about the commercial and legal climate of such countries. BITs help ensure that foreign investors have key protections and independent and reliable

[13]U.S. Dep't of State, "Cross-Border Investment in a Post-Recession World," Speech by Robert D. Hormats, Under Secretary for Economic, Energy and Agricultural Affairs, U.S. Department of State, before the United States Council for International Business (Mar. 10, 2010), at http://www.state.gov/e/rls/rmk/2010/138306.htm.

[14]*See, e.g.*, United Nations Conference on Trade and Development, World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, UNCTAD/WIR/2009, ISBN: 978-92-1-112775-1 at xix, xxi, 4, 13-15, 20, at http://www.unctad.org/en/docs/wir2009_en.pdf. Even with the decrease in investment flows as a result of the global economic crisis, foreign direct investment continues to play an important role in developing countries.

dispute settlement in developing countries with legal systems that are underdeveloped, corrupt or crumbling.

Also important in this regard is the fact that there are over 2500 BITs around the world, of which the United States is party to only 40. As a result, U.S. investors are already at a competitive disadvantage compared to many of their major competitors from countries with much more extensive BIT networks. The Executive Branch, in consultation with Congress and business and other stakeholders, is working to complete its review of the 2004 Model BIT and proceed with negotiations with China, India, Vietnam and other countries.[15]

3. Unqualified Access to Investor-State Dispute Settlement Is Vital to the Operation of the U.S. BIT Program

Article VI of the U.S.-Ecuador BIT provides for the resolution of investment disputes between a Party to the BIT and a foreign investor, providing the investor the right to choose the forum for resolution – be it the domestic courts of the Party, a previously agreed forum or investor-state arbitration. U.S.-Ecuador BIT Articles VI.2, VI.3. Article VI.4 also provides the consent of both the United States and Ecuador to international arbitration:

> 4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the

[15] See, e.g., Notice of Public Meeting and Solicitation of Written Comments, supra note 2; U.S. Trade Representative, *2010 Trade Policy Agenda*, supra note 6 at 11.

> choice specified in the written consent of the national or company under paragraph 3. . . .

Investor-state dispute settlement provisions, like those found in Article VI of the U.S.-Ecuador BIT, are a principal part of all 40 U.S. BITs currently in force, as well as the investment chapters of seven U.S. FTAs. These provisions are also contained in the BITs of the home countries of our leading economic competitors and are widely viewed to be a vital component of such investment instruments by business and governments.

As stated by Under Secretary of State Hormats, "Increasing capital flows across international borders will require that investors feel secure about the host country's willingness to abide by their contractual obligations, including dispute settlement mechanisms."[16]

Unfiltered access to investor-state dispute settlement is vital to provide a neutral, objective and efficient forum to resolve investor disputes with foreign governments. Investor-state dispute settlement also provides U.S. investors abroad with legal protections similar to those found under the U.S. Constitution and federal and state law. Such provisions, along with the basic commitments entered into by governments in a BIT, also help to create a more predictable commercial

[16]U.S. Dep't of State, "Cross-Border Investment in a Post-Recession World," supra note 13.

environment in the foreign countries in which U.S. investors operate, spurring investment that will promote economic growth in developing countries.

The need for strong BITs with unqualified access to investor-state arbitration is also evident from a review of the countries with which the United States has negotiated BITs. Many, like the Democratic Republic of Congo (Kinshasa), Republic of Congo (Brazzaville), Kyrgyzstan and Azerbaijan, are listed near the bottom of Transparency International's Corruption Perception Index year-after-year.[17] Several U.S. BIT partners are also listed at or below the 25 percentile for rule of law on the Worldwide Governance Indicators published by the World Bank.[18] In short, the United States (as well as other capital exporting countries) oftentimes negotiates BITs with countries in which U.S. investors would face very high risks given their substantial rule of law and/or corruption problems. The BIT is also a critical part of the decision-making analysis for many companies considering new or expanded foreign investments because the BIT creates a more

[17] *See, e.g.*, Transparency International, *Transparency International Corruption Perceptions Index 2009*, at http://www.transparency.org/policy_research/ surveys_indices/cpi/ 2009/cpi_2009_table.

[18] In the World Bank's most recent report, countries with which the United States has BITs in force and that are listed in the 25th percentile or below on rule of law measures in the World Bank's Worldwide Governance Report are: Democratic Republic of Congo, Ecuador, Kyrgyzstan, Bolivia, Cameroon, Republic of Congo, and Honduras. World Bank, *Aggregate Governance Indicators 2009*, at http://info.worldbank.org/governance/wgi/sc_chart.asp.

secure environment and provides a reliable mechanism to resolve disputes quickly and fairly.

In this regard, it should also be emphasized that investor-state dispute settlement provides an objective forum that does not favor either the investor or the government involved in the dispute, as exemplified by a 2007 study that empirically reviewed 52 BIT awards worldwide, finding that governments won in 57.7 percent of the cases.[19]

More broadly, investor-state provisions are important to promote the rule of law and to support reforms by foreign governments that want to develop strong rule of law and judicial processes within their own countries. Indeed, these provisions can help host governments avoid political pressure by providing an internationally accepted forum for the resolution of disputes. As well, investor-state provisions serve an important role in strengthening the United States' ability to enforce international agreements. By creating a more predictable commercial climate, investor-state provisions and BITs more generally help spur greater foreign investment and economic development.

[19]Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, North Carolina Law Review, Vol. 86, 2007.

B. Reversing the District Court's Dismissal of Appellants' Unprecedented Request to Stay Ongoing Arbitration under the U.S.-Ecuador BIT Would Vitiate the U.S. BIT Program

Reversing the District Court's dismissal in this case would vitiate the U.S. BIT program and substantially undermine the objectives that the United States seeks to promote through this program.

A decision by this Court that a U.S. Court could, upon a request by a foreign government or other persons, stay or enjoin investor-state arbitration would nullify one of the primary purposes of the BIT as described above – to provide a neutral, objective and efficient dispute settlement forum for the resolution of disputes between investors and the foreign country. Such a decision would essentially create a gatekeeper role for U.S. courts, which would slow down the investor-state dispute-resolution process and, if the arbitration were ultimately stayed, deny the ability of U.S. investors to access the neutral and objective investor-state arbitration forum on which they relied.

A reversal of the District Court decision would also have highly negative ramifications on the U.S. BIT program more broadly and the more than 40 U.S. BITs and the seven trade and investment agreements that the United States has negotiated, signed and entered into with foreign countries. This litigation is being closely reviewed by arbitration lawyers and commentators throughout the United States and beyond. If Appellants' request were granted, the benefits of investor-

state arbitration would be nullified. It would no longer be a guaranteed forum for the resolution of disputes, but would become unreliable. This in turn would not only impact existing U.S. investments overseas and disputes arising out of them, it would also negatively affect the decisionmaking of U.S. companies in terms of their future investments. Already, BITs are an important part of the international strategic decisionmaking of U.S. companies because they lower the risks of foreign investment. Without the guarantee of a neutral and efficient investor-state arbitration mechanism, the risk of foreign investment in particular countries would change considerably, resulting generally in less U.S. foreign direct investment in those countries, contrary to the Executive Branch's objectives.

Even more significantly, such a decision would send a message to other foreign governments that they could similarly use domestic courts to limit U.S. rights under BITs and other investment agreements by requesting a stay of ongoing or future BIT arbitrations involving U.S. investors. As a result, the BIT's guarantee of a neutral, objective, and efficient forum for the resolution of disputes would be destroyed, undermining as well the investment-promotion and other foreign-policy objectives that BITs provide.

Furthermore, any decision that would grant non-parties to the BIT arbitration the ability to stop an arbitration from going forward would vitiate the BIT program. Third-party challenges to BIT arbitration would proliferate by competitor

companies or other persons or groups that would seek to undermine the litigation, thereby nullifying any ability for the BIT to provide the neutral and efficient dispute resolution on which investors have long relied and which the Executive Branch has long promoted.

In sum, even if the Court finds it has the authority to grant Appellants' request, it should abstain from doing so, given the substantial damage that such a decision would do to international commerce and the important Executive Branch objectives of the U.S. BIT program.

CONCLUSION

For the foregoing reasons and those set forth in the Appellees' brief, the judgment of the District Court should be AFFIRMED.

Respectfully submitted,

_____

Daniel A. Cohen (2004-523)
Kornstein Veisz Wexler & Pollard, LLP
757 Third Avenue
New York, NY 10017
(212) 418-8640

Attorneys for Amici Curiae Emergency Committee for American Trade and National Association of Manufacturers

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 5,745 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

Dated: July 1, 2010

_____

Daniel A. Cohen (2004-523)